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IN THE

United States Supreme Court

2004 TERM

SANJAY SARDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Petitioner denied due process of law when convicted of violating the parental kidnapping statute (18 U.S.C. § 1204) if, when he traveled to India with his daughter, he possessed equal custodial rights with his wife, violated no custody award, commenced a custody proceeding in the Indian courts on notice to his wife, and returned the child to the United States as previously intended at his own expense?

2. Was Petitioner denied due process of law when the District Court directed a verdict concerning an element of the crime?

3. Was Petitioner denied due process of law and a fair trial when the District Court denied defense counsel's request to instruct the jury on "reliance on counsel" defense to rebut the element of obstructive intent?

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OPINION BELOW

On June 16, 2004, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming Petitioner's judgment of conviction (*United States v. Sanjay Sardana*, 101 Fed. Appx 851 [2nd Cir. 2004]). Application for re-hearing *en banc* was denied on July 29th, 2004.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 29 U.S.C. § 1254(i). The Petition has been filed in a timely manner, pursuant to Rule 13(3).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1204 States: International Parental Kidnapping

(a) Whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section—

(1) the term "child" means a person who has not attained the age of 16 years; and

(2) the term "parental rights," with respect to a child, means the right to physical custody of the child—

(A) whether joint or sole (and includes visiting rights); and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be affirmative defense under this section that—

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence;

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances with 24 hours after the visitation period has expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

Federal Rules of Criminal Procedure

Rule 52(a) of the Federal Rules of Criminal Procedure states:

> "Any error, defect, irregularity or variance which does not affect substantial rights, shall be disregarded."

Issues Presented

(1) whether in the absence of a court order or written agreement between the parties, a biological father can transport his child out of the United States and thereafter promptly commence a custody proceeding in India on notice to, and with his wife's participation make the child available for visitation, and still be convicted of parental kidnapping (18 U.S.C. § 1204)

(2) whether the trial judge over objection can direct a verdict concerning an element of the crime (*i.e.*, custodial rights);

(3) whether a "reliance on counsel" defense was properly precluded from the Court's charge where sought to rebut the element of obstructive intent?

STATEMENT OF FACTS

Background

Petitioner Sanjay Sardana was convicted of parental kidnapping in violation of 18 U.S.C. § 1204 following a jury trial in the United States District Court, Eastern District of New York (Glasser, J.), and was sentenced to serve a 10-month term of imprisonment, 5 months in a

Bureau of Prisons facility, and 5 months in home confinement. He is at liberty on bail pending appeal granted by a Panel of the United States Court of Appeals for the Second Circuit. He has been directed to self-surrender to a Bureau of Prisons-designated facility on September 20th, 2004 to serve the initial 5-month imposed term of imprisonment.

The Trial

At the trial, the jury heard testimony indicating that Petitioner and his estranged wife, Parul Sardana, were living separately when Petitioner and his daughter, Siena, traveled to India—a country where the parties had their wedding reception, and strong family ties. There was no custody order in place at the time of the trip, nor concededly was one ever introduced in evidence at any point in the trial; under New York law, each was deemed an appropriate custodial parent.

Subsequent to arrival in India, Petitioner commenced a custody proceeding on notice to his wife, subject to United States and Indian civil law. She subsequently appeared before the Indian courts with counsel. She was afforded access to their daughter both by telephone, and in person. Ultimately, prior to a final determination, a private agreement was reached (T-212-213) (A-129-130)[1], and Petitioner returned to the United States with his daughter, as intended from the outset, at his own expense, and surrendered. No custody order or agreement addressing custody was introduced in evidence, or claimed to have been violated.

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[1] Parenthetical references are to the trial transcript (T) and appellate appendix (A).

The Court's Charge

Following closing argument by counsel, Judge Glasser charged the jury on the law. Defense counsel excepted to the Court's ruling that, as biological mother, Parul Sardana had the right to sole physical custody until said right was terminated (T-260). The Court also denied defense request with respect to Request to Charge #2 to instruct the jury on "reliance on counsel" (T-263), as well as the operative New York State statutes, including on sole or joint as further elaborated on in the renewed Rule 29 motion at the conclusion of the entire case.

The Sentence

Judge Glasser sentenced Petitioner to a ten-month term of imprisonment, consisting of five months in custody, and 5 months of home confinement.

The Appeal

A Panel of the Court of Appeals applied *United States v. Amer*, 110 F.2d 873 [2d Cir. 1997] as a precedential basis for affirming the conviction. The summary order dated June 16th, 2004 is annexed hereto (A-1). The Court of Appeals declined to re-hear the appeal *en banc* (A-1).

REASONS FOR GRANTING THE PETITION

POINT I

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT DEFENDANT OF PARENTAL KIDNAPPING BECAUSE NO CUSTODY ORDER WAS FLOUTED AND HE DID NOT ACT WITH OBSTRUCTIVE INTENT.

Petitioner Sanjay Sardana was convicted of violating 18 U.S.C. § 1204, even though the Government's proof at trial failed to establish:

(1) a court award of custody to his wife;

(2) that he failed to reasonably notify his wife of his whereabouts and commencement of a custody proceeding;

(3) that he denied his wife access to the child.

The proof at trial demonstrated that:

(1) Petitioner promptly moved in a court of competent jurisdiction seeking to obtain joint legal and physical custody;

(2) he remained in India, pending a resolution of initiated court action;

(3) he made the couple's daughter available for communication and visitation; and

(4) he returned to New York with his daughter as intended from the outset.

This Court has never reviewed a Section 1204 conviction. The existing cases generally involve flouted court orders, or *ex parte* litigation commenced in distant forums where the allegedly injured party is not on equal footing. In *United States v. Amer*, 110 F.3d 873 [2d Cir. 1997], an Egyptian citizen removed the marital children in late January, 1995 to Egypt. Importantly, in February, 1995 the wife:

(a) sought a court award of custody;

(b) obtained legal custody by court order;

(c) obtained a court arrest warrant; and

(d) lost custody of her children under Egyptian law who were left behind abroad.

Here, Parul Sardana did not have, nor did Petitioner ever fail to honor, a court order. Indeed, no court order was *ever* introduced on the Government's case. Moreover, in *Amer*, the children were kept away from the mother throughout the charged time period. Here, by contrast, Petitioner returned to the jurisdiction with the child as planned from the outset. Accordingly, a threshold question is whether *Amer* should be extended to cases which lack proof of a court custody order. We submit that it should not.

The most recent case involving Section 1204 is *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40 [1st Cir. 1/21/04] which addressed the legal insufficiency question. It is, however, we respectfully submit, significantly distinguishable.

Circuit Judge Howard's opinion carefully noted both a marital history replete with threats by Defendant, and a vigorous campaign of covert surveillance of his wife's activities. Defendant took the children with him to India.

Importantly, his wife thereafter *promptly* obtained an emergency custody order in the Massachusetts Probate Court, of which Defendant was subsequently apprised. He then apparently moved *ex parte* for custody in the courts in Nagpur, India (*see United States v. Fazal-Ur-Raheman-Fazal*, *supra*, pages 42-43).

This differs from *Sardana*, in which there was no State Court order which Petitioner flouted, nor was the foreign litigation conducted *ex parte*. Rather, Parul Sardana vigorously litigated in the Indian courts, and had access to her daughter, Siena. She never sought custody at any time prior to Petitioner's trip to India.

We believe that this case provides a needed opportunity to address whether the wife's bare possession of parental rights which are in no way superior to those of Petitioner, *without* a court order or operative custody agreement, is sufficient to violate Section 1204, *and* whether a defendant's subsequent custody litigation on notice to the complaining spouse defeats a claim of obstructive *mens rea*. The Panel decision, to which this Petition is addressed, noted that the motivation for litigation in India was his belief he would receive "fairer treatment" in India than in the courts of Brooklyn, New York (T-226-27). We dispute, and the Panel decision provides no legal support for the conclusion, that proceeding from that assumption was sufficient to support a finding of "obstructive intent." We submit that fewer parental rights does not mean less rights, or less favorable, taken in proper context in light of full testimony. What Petitioner sought was an equitable (50/50) custody arrangement.

A fair reading of Section 1204, against this backdrop, reveals that the mere alleged failure to yield to complainant's "parental rights" does not, standing alone, vio-

late the statute. Rather, this must occur with an "obstructive intent." We submit that, while a unilateral removal might well, from complainant's perspective, be viewed as a dimination of her "parental rights," Petitioner's commencement of litigation in the Indian courts on notice surely belies any intent to unlawfully obstruct. Foreign "forum shopping" may offend some, but can it truly be said to arise to the level of obstruction of justice?

We live in a time when many feel that the role of the federal government has inappropriately intruded itself into matters customarily long thought to be local matters to be resolved in the State Courts. The sought extension of Section 1204 to a case which lacks a civil custodial order, and which ignores Petitioner's initiated custody litigation on appropriate notice to the estranged spouse, extends Section 1204 to situations unforeseen, we submit, by the statute's drafters, and certainly not clearly encompassed by the present statute on its face (*see e.g., United States v. Sun Diamond Growers of California*, 526 U.S. 398, 412-13 [1999]).

This Court should review this case to definitively interpret the proper application of the parental kidnapping statute, for if there is ever to be a case reviewed under this statute, this would have to be it as contrasted with all the other petitions presented to the Court, over the past eleven years, which have been denied because of a flouted court order. There has, we note, never been a reported case of an individual possessing equal parental rights being convicted where no court order or agreement was proven to have been violated. The panel decision fails, we submit, to respect Congress's "strong intention" preferring that civil remedies be used to resolve difficult custody cases (Remarks of President Clinton in signing the Parental Kid-

napping Bill into law (*see* 4 U.S.C.C.A.N. P. 2424 [12/6/93]).

Moreover, to the extent that the First Circuit's opinion in *Fazal-ur-Raheman-Fazal*, *supra* involved a Massachusetts State court order (albeit one obtained subsequent to Defendant's trip) which was violated, whereas none was in *Sardana*, there is a "conflict between the circuits" which warrants review by this Court.

POINT II

MULTIPLE ERRORS AND OMISSIONS IN THE COURT'S CHARGE LESSENED THE GOVERNMENT'S BURDEN OF PROOF AND DEPRIVED DEFENDANT OF A FAIR TRIAL

Any review of a trial judge's jury charge commences with a two-fold recognition:

(1) The trial court is prohibited from directing a verdict on any element of the crime charged (*see Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106 [1986]; *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 [2000]; and

(2) The charge must be appropriately "balanced" to insure that the jury is given both an appropriate, and dispassionate, explanation of the operative legal principles (*United States v. Bright*, 517 F.2d 584, 587 [2d Cir. 1975]; *United States v. Dove*, 916 F.2d 41, 45-46 [2d Cir. 1990]).

A. The Removal of an Element of the Crime

With respect to the first concern, it is clear that Judge Glasser unilaterally removed the issue of "parental rights" from jury consideration, and did so in a manner which failed to accord *any* status to Defendant's rights, or to note the possible significance of a court custody order. It is clear that this constitutes constitutional error (*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 [1977]; *Connecticut v. Johnson*, 460 U.S. 73, 84 [1983]).

That having been noted, the next question is whether the error was "harmless" within the meaning of Rule 52(a) of the Federal Rules of Criminal Procedure[2]. Any such analysis commences with the recognition that the burden of proof rests with the Government (*In re Winship*, 397 U.S. 358, 361-64 [1970], *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 1778 [1993]). A Defendant carries no burden to establish a custody award to himself. Judge Glasser's comments at transcript page 220, relative to the absence of a court having affirmatively authorized Petitioner to "do it," (travel to India with Siena) surely suggested to the jury that the Defendant had a burden of proof which he failed to carry.

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[2] Because trial counsel objected in a timely fashion, this is not a case falling under the "plain error" rule found in Rule 52(b) of the Federal Rules of Criminal Procedure (*e.g., United States v. Fazal-Ur-Raheman-Fazal, supra, accord United States v. Whab*, 355 F.3d 155, 158-59 [2d Cir. 2004]) (reviewing Judge Saris' charge under plain error). Both judges Saris and Glasser acted in a manner which treated custody rights much like District Judges treated the concept of "materiality" prior to *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 [1995]. This approach concededly no longer passes constitutional muster.

In the context of a case in which each party possessed custodial rights no less worthy than the other (*see* New York Domestic Relations Law § 70[3] and 236[4]), and where no custody order was flouted, the Court's charge had the decided effect of structurally altering and reducing the Government's burden of proof (*see United States v. Sun Diamond Growers of California, supra, cf. United States v. Neder*, 527 U.S.1, 119 S.Ct. 1827, 1833 [1999]) (*Gaudin* error can be found harmless). This was not a harmless omission, and is contrasted with harmless error claims based upon a mere "inadvertent" omission to charge a statutory element. Here, the jury was told that the element had been proven. The portion of the panel's decision which addresses custodial rights fails to explain the appropriateness of removing an element of the crime charged after this Court's rulings (see e.g., *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313-2316 [1995]).

B. Reliance Upon Counsel

Additionally, the Court's charge became even less balanced and less fair when it refused to charge the jury on Defendant's theory of defense—reliance upon the advice of his counsel (*see e.g., United States v. Crowley*, 236 F.3d 104,110-111 [2d Cir. 2000]).

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[3] Section 70 states: "In all cases, there shall be no *prima facie* right to the custody of the child in either parent. . ." *see also Braiman v. Braiman*, 44 N.Y.2d 584, 589, 407 N.Y.S.2d 449, 450 [1978]).

[4] New York Domestic Relations Law § 236, Part B, ¶(e) defines "custodial parent" as a parent to where custody of a child. . . is granted by a valid agreement of the parties, or an order of the Court." The panel's summary order, we submit, fails to respect the custodial rights of the father as equal (e.g. *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2060-61 [2000]).

Here, reliance upon the advice of counsel is a recognized aspect of a jury charge ("Modern Federal Jury Instructions," Section 8.04 [Siffert & Sand, Matthew Bender], and "Federal Jury Practice and Instructions," § 19.06 [O'Malley, Greenig, etc. 2000])—particularly in the context of a case where obstructive *mens rea* is an element of the offense which must be found beyond a reasonable doubt. The failure to so charge, particularly in light of the directed verdict on another element, we submit, requires reversal (*United States v. Dyer*, 922 F.2d 105, 107-08 [2d Cir. 1990]) in the context of a trial involving a specific intent statute—one requiring proof of "obstructive intent" (*e.g., United States v. Duncan*, 850 F.2d 1104, 1115-1119 [6th Cir. 1988]; *United States v. Platt*, 435 F.2d 789, 790-792 [2d Cir. 1970, per Friendly, J.]).

The core issue in *Sardana* was one of intent. Petitioner attempted to present an appropriate basis for acquittal by arguing that he acted in reliance upon the advice of counsel (a U.S. legal consultant (Indian attorney) obtained from the U.S. Embassy website in New Delhi). His belief, if honestly held (even if viewed as objectively unreasonable), would have justified an acquittal (*Cheek v. United States*, 498 U.S. 192, 202-03 [1991]).

The case which the panel relied upon, *United States v. Remini*, 967 F.2d 754,757 [2nd Cir. 1992], involved a contempt conviction for refusal to testify at a trial in the Brooklyn Federal Court after being directed to do so by the trial judge. We do not dispute that a lawyer's alleged advice cannot trump a clear direction by the trial judge. In *Sardana*, however, no judge's order was violated, and Petitioner's reliance on legal advice appropriately impacted upon the element of "obstructive intent."

The issue of the appropriateness of giving a "reliance on counsel" charge is surely an issue of law, in the context of a specific intent charge, which this Court should review (see *Williamson v. United States*, 207 U.S. 425, 453 [1908]). Petitioner was no less entitled than Williamson to have his intent appropriately evaluated by a jury's consideration of the legal advice upon which he relied in good faith.

This Court has not addressed the appropriateness of such a legal instruction *vis a vis* a specific intent crime. In this complex age in which we live, its parameters cry out for legal definition.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED, THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT VACATED, AND THE CASE REMANDED FOR APPELLATE REVIEW CONSISTENT WITH THIS COURT'S RULING.

Dated: New York, New York
September 14, 2004

Respectfully submitted:

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